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No. _____

In The

Supreme Court of the United States

October Term, 1991

SKY CHEFS, INC., a Delaware corporation,

Petitioner,

v.

CONNIE DIAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does a corporation held liable under the doctrine of respondeat superior for acts of a male supervisor have standing to assert a violation of the supervisor's right to equal protection of the laws that results in direct injury to the corporation?

2. Does the discriminatory use of peremptory challenges in a civil action violate a party's right to equal protection of the laws?

3. Do equal protection principles prohibit a party from exercising peremptory challenges on the basis of a venireperson's gender?

4. Does the imposition of punitive damages on an employer for the unauthorized acts of its employee violate the employer's right to due process of law?

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[1] *List of parties to the proceeding below.* The parties to the case below were the Petitioner Sky Chefs, Inc., a Delaware corporation and wholly-owned subsidiary of Onex Corporation, a Canadian corporation and the Respondent Connie Dias.

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SKY CHEFS, INC., a Delaware corporation,

Petitioner,

v.

CONNIE DIAS,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sky Chefs, Inc. ("Petitioner" or "Sky Chefs") respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit entered on November 27, 1990.

OPINIONS BELOW

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 27, 1990, is reported at 919 F.2d 1370, 54 Fair Empl. Prac. Cases 852 and appears in Appendix A.

Judgment was entered in the United States District Court for the District of Oregon on June 23, 1989 following the denial of the post-trial motions of Sky Chefs, Inc. and appears in Appendix A.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit was entered on November 27, 1990.

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Sky Chefs has standing to assert the defenses set forth in this Petition pursuant to Article III of the United States Constitution, which states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States,

> and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. CONST. art. III, § 2.

Sky Chefs asserts a violation of the fifth amendment to the United States Constitution which states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend. V.

Sky Chefs asserts a violation of the fourteenth amendment to the United States Constitution which states:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

> (1) Except as otherwise specifically provided by law, a claim for punitive damages shall be established by clear and convincing evidence.
>
> (2) In a civil litigation in which a party seeks punitive damages from another party, evidence of the financial condition of a party shall not be admissible until the party seeking such damages has presented evidence sufficient to justify to the court a prima facie claim of punitive damages.

OR. REV. STAT. § 41.315.

STATEMENT OF THE CASE

Respondent, Connie Dias ("Respondent" or "Dias") was employed as a clerical worker in the Portland, Oregon facility of Petitioner,[1] from April 1985 until her termination on December 7, 1987. During the final few months of Dias' active employment by Sky Chefs, Mr. Tony Nathalia was the general manager of the Portland facility. After Dias suffered an on-the-job injury in June 1987, she took an injury leave of absence. During her leave, her job was eliminated and when Dias attempted to return to work in December 1987, she was terminated.

Dias brought this action against Petitioner in the United States District Court for the District of Oregon. Dias alleged three state law claims against Sky Chefs[2]

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[1] Respondent was the Plaintiff-appellee in the lower court proceedings and Sky Chefs was the Defendant-appellant.

[2] The district court had jurisdiction over this case by virtue of the diversity of citizenship of the parties pursuant to 28

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including intentional infliction of severe emotional distress; wrongful discharge for protesting the sexual harassment of others; and violation of OR. REV. STAT. § 659.410 (discrimination against employees applying for workers' compensation benefits). *Dias v. Sky Chefs, Inc.*, 919 F.2d 1370, 54 Fair Empl. Prac. Cases 852 (9th Cir. 1990).

Dias claimed that Sky Chefs was vicariously liable to her under the doctrine of respondeat superior for the acts of Sky Chefs' agent, Mr. Nathalia. The essence of Dias' claims was that Mr. Nathalia engaged in a pattern of sexually harassing female employees at the Portland facility. When Dias protested the hostile environment sexual harassment, Mr. Nathalia made her work-life extremely uncomfortable. *Dias*, 919 F.2d at ___, 54 Fair Empl. Prac. Cases at 853. Mr. Nathalia was not named as a defendant in the case.

The case was tried to a jury composed of six women on June 13 through 16, 1989. The jury venire consisted of fourteen jurors, three men and eleven women. Respondent used her peremptory challenges to strike all of the men from the jury panel. Petitioner timely objected to Respondent's peremptory challenges on the ground that Respondent had systematically excluded individuals from the jury based on their gender. Despite Petitioner's objection, the district court made no inquiries of Dias, empaneled the jury and proceeded with the trial.

The jury was provided with a special verdict form containing the following questions: "(1) Was Tony

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U.S.C. § 1332. The Ninth Circuit had jurisdiction over the appeal pursuant to 28 U.S.C. § 1332 and 28 U.S.C. § 1291.

Nathalia acting as Sky Chefs' agent with respect to Connie Dias' claims? (2) Did Tony Nathalia intentionally cause Connie Dias to suffer extreme emotional distress? (3) Did Tony Nathalia wrongfully discharge Connie Dias in retaliation for her protesting the sexual harassment of others? (4) Did Tony Nathalia discriminate against Connie Dias because she filed a workers' compensation claim?" Petitioner's objection to the special verdict form was denied.

The jury returned a verdict for Dias on her claims of intentional infliction of severe emotional distress and wrongful discharge. It awarded her $125,000 in general damages and $500,000 in punitive damages. The jury found for Sky Chefs on Dias' statutory workers' compensation discrimination claim.

The jury verdict against Sky Chefs was based solely on vicarious liability. The jury was not required to find, and the evidence did not show, that Sky Chefs knew or should have known of the alleged harassment by Nathalia. Moreover, it was undisputed, that when Sky Chefs learned about complaints against Nathalia (after Dias had been discharged), Sky Chefs immediately investigated the complaints and terminated Nathalia.

The district court entered judgment on June 13, 1989, and denied Sky Chefs' post-trial motions on September 21, 1989. Sky Chefs timely filed its appeal with the United States Court of Appeals for the Ninth Circuit on October 5, 1989. The Ninth Circuit affirmed the district court's judgment on November 27, 1990.

The Ninth Circuit held that Sky Chefs was liable for the torts of Nathalia because Nathalia was acting within

the scope of his employment. *Dias v. Sky Chefs, Inc.*, 919 F.2d at ___, 54 Fair Empl. Prac. Cases at 855. The Ninth Circuit, applying Oregon law, upheld the punitive damage award on the ground that, "Oregon law has long held that punitive damages may be awarded when a company agent is 'employed in a managerial capacity and [is] acting in the scope of employment.' " *Id.* at ___, 54 Fair Empl. Prac. Cases at 856 *quoting Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790, 791 (1975).

The Ninth Circuit also denied Sky Chefs' claim that its fifth amendment right to equal protection under the law was violated by the Respondent's use of peremptory challenges to strike all males from the jury venire, leaving an all-women jury. *Id.* at ___, 54 Fair Empl. Prac. Cases at 859.

REASONS FOR GRANTING THE WRIT

A. This Case Presents Exceptionally Important Questions of Federal Law Which Have Far Reaching Consequences for Civil Litigation.

This case involves questions concerning the discriminatory use of gender based peremptory challenges in civil litigation. Currently, there exist direct conflicts in decisions among the Circuit Courts of Appeal as to whether the principles announced in *Batson v. Kentucky*, 476 U.S. 79 (1986) are applicable to gender based peremptory challenges,[3] or even to civil litigation.[4] Sup. Ct. R. 10.1(a).

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[3] *United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988) (*Batson* does not apply to gender based peremptory challenges); *United States v. De Gross*, 913 F.2d 1417 (9th Cir. 1990) (*Batson* does apply to gender based peremptory challenges).

[4] *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, 110 S.Ct. 201 (1989); *Dunham v. Frank's Nursery & Crafts, Inc.*,

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This case also raises the important question of federal law of whether a corporation which has been held vicariously liable through the doctrine of *respondeat superior* has standing to object to the discriminatory use of peremptory challenges; a right which otherwise could be asserted by the non-party agent. Sup. Ct. R. 10.1(c).

The fact that there exist conflicts among the Circuit Courts of Appeal on two of these issues, (gender based peremptory challenges and *Batson's* applicability to civil litigation), and that the third issue, (the standing of a *respondeat superior* defendant to raise defenses of its unnamed agent) has not been previously addressed, coupled with the extreme importance of resolving these issues dictates that a writ of certiorari should issue.

B. Sky Chefs Has Standing to Object to Dias' Use of Peremptory Challenges to Exclude Males from the Jury Panel

The courts below erred in denying Sky Chefs' objection to Dias' use of her peremptory challenges to strike all of the males from the jury panel. The district court's failure to conduct an evidentiary hearing addressing Dias' motives for her use of peremptory challenges violated Sky Chefs' right to equal protection of the laws guaranteed by the due process clause of the fifth

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919 F.2d 1281 (7th Cir. 1990) (*Batson* applies in civil litigation); *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990) (*en banc*), *cert. granted*, (*Batson* does not apply to civil litigation).

amendment of the United States Constitution.[5] U.S. CONST. amend. V. In *Batson v. Kentucky*, 476 U.S. 79 (1986), this Court held that the equal protection clause of the fourteenth amendment forbids a prosecutor in a criminal case from exercising peremptory challenges against potential jurors solely on account of the juror's race or on the assumption that black jurors as a group will be unable to impartially consider the state's case against a black defendant. *Batson*, 476 U.S. at 90. In *Batson*, the black defendant was entitled to raise the exclusion of members of his race from the jury as violating his right to equal protection of the laws. Although a defendant is not entitled to a jury composed of any particular race, "the defendant does have a right to be tried by a jury whose members are selected through non-discriminatory criteria." *Batson*, 476 U.S. at 85-86 *citing Martin v. Texas*, 200 U.S. 316, 321 (1906); *Ex Parte Virginia*, 100 U.S. (10 Otto.) 339, 345 (1880). Discrimination in selection of jurors not only harms the accused, but also harms the excluded jurors and the entire community. *Batson*, 467 U.S. at 87.

The Ninth Circuit denied to Sky Chefs the right to raise an equal protection violation on the ground that as a corporate entity Sky Chefs was without standing either as a member of the constitutionally protected class being

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[5] This case involves a federal defendant and thus, Sky Chefs' equal protection claim is based on the due process clause of the fifth amendment. *See Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). The right to the equal protection of the laws expressed in the fourteenth amendment has been found by implication in the due process clause of the fifth amendment. *Weinberger v. Wiesenfeld*, 420 U.S. 636, 638 n.2 (1975).

excluded (males), or as a third party asserting the rights of excluded jury members. *Dias v. Sky Chefs*, 919 F.2d at ___, 54 Fair Empl. Prac. Cases at 858-9.

Moreover, the Ninth Circuit failed to recognize Sky Chefs' standing to assert the rights and defenses of Tony Nathalia, the male for whose conduct the jury found Sky Chefs to be vicariously liable. Sky Chefs was sued and was held liable for general and punitive damages based, not on its own acts, but based on the acts of Tony Nathalia acting as Sky Chefs' agent. It is therefore incongruous to hold Sky Chefs liable for the acts of its agent, yet to deny Sky Chefs the ability to assert the rights and defenses of its agent.

1. Sky Chefs Has Satisfied the Requirement of Injury in Fact.

Sky Chefs satisfied both the constitutional requirements and the prudential considerations necessary to establish standing to raise the equal protection rights of Nathalia as a defense in this action. The constitutional limitations on standing are contained in Article III of the U.S. Constitution which limits the "judicial power" of the United States to the resolution of "cases" and "controversies." U.S. CONST., art. III, § 2. This Court has established the limits of Article III standing as follows:

> [a]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99, 99 S.Ct. 1601, 1608, 60 L. Ed.2d 66 (1979), and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed

> by a favorable decision,' *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41, 96 S.Ct. 1917, 1924, 1925, 48 L. Ed.2d 450 (1976).

Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464, 472 (1982).

The action challenged by Sky Chefs – the intentional and discriminatory exclusion of males from the jury – resulted in actual injury to Sky Chefs not only in the form of money damages of well over half a million dollars, but also in damage to Sky Chefs reputation as a fair employer.[6] Although Respondent's claims were not styled as such, Sky Chefs in essence was held liable derivatively for the sexual harassment by Nathalia of women at the Portland, Oregon facility. In a case such as this, involving evidence regarding sexual harassment, the temptation of litigants to strike jurors on the basis of gender is apparent. A decision requiring Respondent at the very least to explain the basis for her peremptory challenges of all males from the jury establishes that the injury suffered by petitioner "is likely to be redressed by a favorable decision." Sky Chefs has therefore satisfied the Article III standing requirements.

2. Prudential Principles Support Sky Chefs' Standing to Raise the Equal Protection Rights of Nathalia.

Beyond the constitutional requirements, the federal judiciary also adheres to a set of prudential principles

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[6] It is well settled that the injury necessary to satisfy Article III standing need not be economic. *United States v. SCRAP*, 412 U.S. 669, 686-688 (1973); *Association of Data Processing Service Orgs. v. Camp*, 397 U.S. 150, 153-154 (1970).

that bear on the question of standing. *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. at 474. One general principle is that, "the plaintiff generally must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). However, "in some circumstances, countervailing considerations may outweigh the concerns underlying the usual reluctance to exert judicial power when the plaintiff's claim to relief rests on the legal rights of third parties." *Id.* at 500-501.

In this case, an exception exists to the general rule that a party is precluded from resting a claim on the legal rights or interests of third parties. Unlike the petitioner's claims in *Warth v. Seldin*, and *Valley Forge Christian College*, Sky Chefs is not asserting a claim for relief, nor is Sky Chefs pursuing an abstract question of wide public significance. Instead, Sky Chefs is asserting the rights of its agent, Nathalia, (for whose acts Sky Chefs was held vicariously liable), as a defense to unconstitutional conduct by Respondent that directly injured Petitioner.

Sky Chefs was held liable for the acts of its agent of which Sky Chefs had no knowledge, did not authorize and indeed eliminated at the earliest possible moment. To impose vicarious liability on Sky Chefs without granting Sky Chefs the concomitant right to assert defenses that may have inured to Nathalia would be contrary to numerous decisions of this Court allowing a party who is directly injured by the unconstitutional conduct of another to raise the rights of a third party defensively as a bar to judgment against it.

This case is most analogous to cases where the standing issue arose when a litigant asserted the rights of third parties defensively, as a bar to judgment against him. *See, e.g., Allee v. Medrano*, 416 U.S. 802 (1974) (union organizing committee had derivative right to raise any claim an individual union member might have had); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (executive and medical director of Planned Parenthood League permitted to raise the constitutional rights of the married people with whom they had a professional relationship); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (owners of private schools permitted to assert the constitutional rights of parents and guardians); *Truax v. Raich*, 239 U.S. 33 (1915) (employee permitted to assert the rights of his employer).

In *Barrows v. Jackson*, 346 U.S. 249 (1953), *reh'g denied*, 346 U.S. 841 (1953), for example, this Court granted third party standing to the Petitioner raising the equal protection rights of third parties not joined in the action. The issue in *Barrows* was whether a restrictive covenant against the sale of realty to non-Caucasians could be enforced in a damage action against a party to the restrictive covenant who breached the racial restriction. *Id.* at 251.[7] The complaint in *Barrows* alleged that the respondent broke the covenant by conveying real estate without incorporating the restrictive condition contained in the covenant and by permitting non-Caucasians to move in

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[7] It had previously been established that racially restrictive covenants could not be enforced in equity against black purchasers of property because enforcement of the covenant would constitute state action denying equal protection of the laws to blacks in violation of the fourteenth amendment. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

and occupy the premises. *Id.* at 252. No non-Caucasian claiming to have been denied his constitutional rights was a party to the action. *Id.* at 254. This Court held that the respondent, subject to an action for damages to pay for her failure to honor the restrictive covenant, could rely on the invasion of the rights of the nonparty non-Caucasian as a defense to the state court action.

The *Barrows* Court confirmed the general rule that one may not ordinarily claim standing to vindicate the constitutional rights of third parties. The prohibition against invoking the rights of others is to insure that a person's challenge to an action is based on a palpable injury to that individual. The injuries suffered by the respondent in *Barrows*, the suit for damages for $11,600, however, indicated direct and substantial damage to the respondent justifying respondent's ability to raise the constitutional rights of nonparties as a defense to the state court action. *Id.* at 255-256. This Court concluded:

> The relation between the coercion exerted on respondent and her possible pecuniary loss thereby is so close to the purpose of the restrictive covenant, to violate the constitutional rights of those discriminated against, that respondent is the only effective adversary of the unworthy covenant in its last stand. She will be permitted to protect herself and, by so doing, close the gap to the use of this covenant so universally condemned by the courts.

Barrows, 346 U.S. at 259.

The coercion exerted on Sky Chefs as a result of the discriminatory use of peremptory challenges by Respondent, and Sky Chefs' actual pecuniary loss, likewise, is so close to the purpose of the discriminatory peremptory

challenges to violate the constitutional rights of Nathalia. Sky Chefs is the only effective adversary given Nathalia's absence as a party in this action. Accordingly, Sky Chefs should be permitted to protect itself, and by so doing, protect the rights of Nathalia.

Finally, the *Barrows* Court noted that the Petitioner was not attempting to protect the rights of non-Caucasians as a group. Instead, she was protecting the rights of particular non-Caucasian would-be users of her restricted land. *Id.* at 259-260. Sky Chefs similarly is not attempting to assert the rights of individuals in general to be free from discrimination by the state in the exercise of peremptory challenges. Instead, Sky Chefs is protecting the rights of Tony Nathalia.

Traditional principles of respondeat superior additionally allow Sky Chefs to assert all defenses to Dias' claims that would have been available to Nathalia. *See, e.g., Norton v. United States,* 581 F.2d 390 (4th Cir. 1978), *cert. denied,* 439 U.S. 1003 (1978); *Kaiser v. Memorial Blood Center of Minneapolis, Inc.,* 721 F. Supp. 1073, 1076 (D. Minn. 1989). In *Norton v. United States,* the plaintiff sued local police officers pursuant to 42 U.S.C. § 1983, federal agents pursuant to the fourth amendment, and the United States under the Federal Tort Claims Act. *Id.* at 392. The individual defendants defended the claims against them on the ground that they acted in good faith and with a reasonable belief in the lawfulness of their actions. The district court held that the good faith and reasonable belief defenses were not available to the United States. The Fourth Circuit reversed, holding that under both traditional principles of respondeat superior and precedent under the Federal Tort Claims Act, the United States

was entitled to assert all defenses available to its agents individually, including the defenses of good faith and reasonable belief. *Id.* at 393, 397.

The Restatement (Second) of Agency also establishes that an employer subject to liability for torts of an employee committed while acting in the scope of his or her employment possesses all the defenses available to the employee. "In an action against the master, the latter has all the defenses open to one defending an action of tort, including contributory negligence, the personal immunity which he has, or a privilege which he or the servants has." Restatement (2d) Agency, § 219, Comment c (1958). Traditional principles of respondeat superior, therefore, require that Sky Chefs be entitled to raise the equal protection violation defense available to Nathalia in this action.

The Ninth Circuit thus erred in holding that Sky Chefs did not have standing to raise the equal protection violation by Respondent as a defense. This case falls squarely within the exception to the general rule allowing a litigant to assert the rights of a third party defensively as a bar to a judgment against it.

C. The Principles of *Batson* Apply in Civil Litigation.

The United States Court of Appeals for the Eleventh Circuit recently held that the principles established in *Batson v. Kentucky* apply in civil as well as criminal cases. *Fludd v. Dykes*, 863 F.2d 822 (11th Cir. 1989), *cert. denied*, ___ U.S. ___, 110 S. Ct. 201 (1989)[8]. *See also, Reynolds v.*

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[8] The Ninth Circuit has not decided whether the principles of *Batson v. Kentucky* apply to civil cases and refused to do so in

(Continued on following page)

City of Little Rock, 893 F.2d 1004 (8th Cir. 1990), *cert. petition filed* (June 25, 1990) (*Batson v. Kentucky* applied to civil action by black plaintiff against city and police department supervisors); *Dunham v. Frank's Nursery and Crafts, Inc.*, 919 F.2d 1281 (7th Cir. 1990).[9] In *Fludd*, a black plaintiff brought a civil rights action against a police officer and the officer's supervisor. The defendants peremptorily challenged the only two black persons on the jury panel resulting in an all white jury. Plaintiff's counsel objected to the challenges on the ground that they were racially motivated and requested that defense counsel give a racially neutral explanation for their action. *Id.* at 823. The district court overruled the objection holding that *Batson* did not apply in civil cases. *Id.* The jury returned a verdict for the defendants and the plaintiff appealed. *Id.* The Eleventh Circuit remanded the case to the district court to determine whether the defendant's attorney challenged the black jurors because they were black or for some nonracially discriminatory reason. *Id.* at 824. Just as a defendant in a civil rights action alleging race discrimination may attempt to exclude jurors of the plaintiff's race, so may a plaintiff in a civil action raising claims of sexual harassment attempt to exclude jurors of the harasser's gender.

(Continued from previous page)

this case. *See Dias v. Sky Chefs, Inc.*, 919 F.2d at ___, 54 Fair Empl. Prac. Cases at 857.

[9] The Fifth Circuit recently reached a contrary conclusion. *Edmonson v. Leesville Concrete Co.*, 895 F.2d 218 (5th Cir. 1990) *(en banc), cert. granted*, 111 S.Ct. 41 (1990).

To establish an equal protection violation, a litigant must demonstrate that the state, and not a private individual, was the source of the purposeful discrimination. The discriminatory actor in the civil context is the trial court. *Id.* at 828.

> Until the trial judge overrules a party's objection to the racial composition of the venire, the law treats any previous decision on the part of a state entity to discriminate as harmless, insofar as the objecting party is concerned. The trial judge's decision – to proceed to trial, over the party's objection, with a jury selected from the venire on the basis of race – is the one that harms the objecting party. In overruling the objection . . . the judge becomes guilty of the sort of discriminatory conduct that the equal protection clause proscribes. Because the trial judge constitutes the discriminatory state actor under the equal protection clause . . . there is no constitutional bar to the application of *Batson* to a civil suit.

Id. at 828 *relying on Strauder v. West Virginia*, 100 U.S. 303 (1879); *Neal v. Delaware*, 103 U.S. 370 (1880).

State action cases indicate that a civil plaintiff who exercises peremptory challenges can be assumed to be a state actor because she makes "use of state procedures with the overt, significant assistance of state officials." *Tulsa Professional Collection Servs. v. Pope*, 485 U.S. 478 (1988). Just as state action occurs when a state court enforces a discriminatory restrictive covenant at the request of third parties, *Shelley v. Kraemer*, 334 U.S. 1 (1948), federal action occurs when a federal trial judge enforces a party's discriminatory peremptory challenge

by excusing the challenged venireperson. *United States v. De Gross*, 913 F.2d 1417, 1424 (9th Cir. 1990).

In *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), this Court found that by allowing a r aurant to discriminate against patrons on the basis of race on state property, the state had effectively abdicated its duty not to discriminate. *Id.* at 723-25. Peremptory challenges are similarly exercised in a public federal building operated in the public interest.

Not only is the trial court a governmental actor in the civil context, but the deprivation of both Nathalia and the venirepersons' equal rights resulted from Dias' exercise of a right created by the state, the right to make peremptory challenges. *See* 28 U.S.C. § 1870; *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982). The federal government supplies the means for a civil plaintiff to deprive venirepersons of their equal rights. The federal government summons citizens for jury service, *see* 28 U.S.C. §§ 1861-1869, and compels them to serve as jurors under threat of criminal prosecution. 28 U.S.C. § 1864(b). Once citizens arrive at the federal courthouse, they are assembled and instructed by federal court officials. Then, during the course of a federal judicial proceeding, and with the assistance of the trial judge, parties invoke judicial procedures which have the potential to deprive venirepersons of their constitutional rights. A party seeking to exercise discriminatory peremptory challenges thus must necessarily rely upon the court to call citizens to serve as jurors, to begin the voir dire in judicial proceeding, and to exclude challenged venirepersons. Accordingly, state action exists sufficient to assert a violation of the fifth amendment in this action.

D. Equal Protection Principals Prohibit Peremptory Challenges Exercised on the Basis of a Venireperson's Gender.

The principals established in *Batson* prohibit the exercise of peremptory challenges on the basis of the venireperson's gender. The Constitution treats gender classifications differently than racial classifications, but both are subject to heightened levels of judicial scrutiny. Racial classifications are considered "suspect classifications". Accordingly, a race based classification must fail unless it is narrowly tailored to serve a compelling state interest. *See City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440-41 (1985) (discussing the different levels of constitutional scrutiny to which different classifications are subjected).

A party seeking to uphold a classification of individuals on the basis of their gender must carry the heavy burden of showing an "exceedingly persuasive justification" for the classification. *Kirchberg v. Feenstra*, 450 U.S. 455, 461 (1981); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979). To withstand constitutional challenge, classifications by gender must serve important governmental objectives and the discriminatory means employed must be substantially related to achieve those objectives. *Craig v. Boren*, 429 U.S. 190, 199 (1976), *reh'g denied*, 429 U.S. 1124 (1977); *Wengler v. Druggists Mutual Ins. Co.*, 446 U.S. 142, 150 (1980).

As this Court held in *Mississippi University for Women v. Hogan*, 458 U.S. 718, 723 (1982), the standard of scrutiny under the equal protection clause is not altered or reduced simply because the state action discriminates

against males rather than against females. *See also, Orr v. Orr*, 440 U.S. 268, 279 (1979).

No "exceedingly persuasive justification" for allowing gender based peremptory challenges exists. This Court has established that the Constitution does not confer a right to peremptory challenges. *Batson*, 476 U.S. at 91. Although peremptory challenges are a necessary means for achieving the important governmental objective of impaneling a fair and impartial jury, *see Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990), *reh'g denied* 110 S.Ct. 1514 (1990); *Swain v. Alabama*, 380 U.S. 202, 211-12 (1965), *overruled in part on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986); *Batson*, 476 U.S. at 123 (Burger, C.J., dissenting), "peremptory challenges constitute a jury selection practice that permit 'those to discriminate who are of a mind to discriminate.' " *Batson*, 476 U.S. at 98 *quoting Avery v. Georgia*, 345 U.S. 559, 562 (1953).

Gender based peremptory challenges are not related to any important governmental objective. In *United States v. De Gross*, the Ninth Circuit upheld the district court's denial of a criminal defendant's peremptory challenge of a male venireperson. 913 F.2d at 1423. Challenges explained by a venireperson's gender, like racial challenges, are based either on the false assumption that members of a certain group are unqualified to serve as jurors, or on the false assumption that members of certain groups are unable impartially to consider the case against a member or a non-member of their group. *Id.* at 1422. "Peremptory challenges exercised on the basis of a venireperson's gender, therefore, are not substantially related to achieving an impartial jury." *Id.*

Gender based peremptory challenges also fail to relate to governmental interests of engendering public confidence in the judicial system. Gender based discrimination in the jury selection process harms not only the litigants, but the exclusion of individuals from a jury on the basis of their gender is incongruous with traditional notions of the jury as a representative body "composed of the peers or equals of the person whose rights it is selected or summoned to determine." *Batson*, 476 U.S. at 86 *quoting Strauder v. West Virginia*, 100 U.S. 303, 308 (1880). As the Ninth Circuit concluded in *De Gross*, "Because gender discrimination during jury selection is not substantially related to the achievement of an important governmental interest, the fifth amendment's equal protection principals compel us to prohibit peremptory challenges on the basis of gender." *Id.*[10]

Sky Chefs established a prima facie case of gender based discrimination in Respondent's use of her peremptory challenges. The procedure that courts are required to follow in addressing a claim of discriminatory use of peremptory challenges was established in *Batson v. Kentucky*, 476 U.S. at 98. If at the time the peremptory strike is questioned, the circumstances raise the inference that the strike has been made for the purpose of ridding the venire of the party's peers, the trial judge must require the striking party to state the reason for the strike. This requires articulation of a neutral explanation for the challenge related to the particular case to be tried. The mere

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[10] The Fourth Circuit appears to have reached a contrary conclusion. *See United States v. Hamilton*, 850 F.2d 1038, 1042 (4th Cir. 1988), *cert. denied*, 110 S.Ct. 1109 (1990).

denial of a discriminatory motive, or an affirmation of good faith in exercising individual strikes, does not suffice as a neutral explanation. *Id.* at 97. Only if the striking party provides a satisfactory explanation does the court have the duty to determine if the defendant has established purposeful discrimination.

Prior to trial, it was clear that Dias intended to call numerous former female employees of Petitioner to testify to the sexual harassment these women suffered while working under Nathalia. Dias then struck all three males from the jury venire resulting in an all female jury. These circumstances certainly "raise the inference that a strike has been made for the purpose of ridding the venire of the accused peers." However, even after Petitioner's objection, the trial judge failed to require Dias to state non-discriminatory reasons for striking all males from the jury.

E. The Imposition of Punitive Damages Violated Sky Chefs' Due Process Rights.

As previously noted, Sky Chefs was held vicariously liable for both general and punitive damages. The amount of punitive damages ($500,000) was four times the amount of general damages ($125,000). Moreover, punitive damages were assessed even though Sky Chefs took immediate remedial steps upon learning of the complaints concerning the actions of its agent Nathalia. Although Oregon law requires the higher burden of proof of "clear and convincing," there are no standards for the imposition of punitive damages. Without meaningful standards, a jury is free to utilize whatever standards it

sees fit to employ. The only standard set by statute is that "evidence of financial condition of a party shall not be admissible until the party seeking such damages has presented evidence sufficient to justify to the court a prima facie claim of punitive damages." ORS 41.315. In this case, the trial court denied Dias access to Petitioner's financial information, yet allowed the jury to determine punitive damages. Clearly the jury was without any standards to determine the propriety of awarding punitive damages or how to determine the amount of such damages. Moreover, because of the vicarious nature of the liability and the absence of standards, the due process rights of Sky Chefs were violated.

CONCLUSION

Sky Chefs has third party standing to raise the discriminatory exclusion of males from the jury by Dias in violation of the fifth amendment. The principles of *Batson v. Kentucky* should be extended to prohibit gender based peremptory challenges in a civil case.

For these reasons, Petitioner respectfully prays that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Ninth Circuit.

Respectfully submitted,

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APPENDIX

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A	1a	Decision and Opinion of United States Court of Appeals for the Ninth Circuit
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

CONNIE DIAS, Plaintiff,	)	NO. CV88-367FR
v.	)	JUDGMENT
SKY CHEFS, INC., a Delaware corporation, Defendant.	)	(Filed June 23, 1989)

THE MATTER came on regularly for trial on the 13th day of June, 1989. Plaintiff appeared by Richard C. Busse of her attorneys and Defendant appeared by Walter V. Siebert and Richard L. Sadler of its attorneys. Thereafter opening statements were heard, testimony and other evidence were introduced by the parties, who thereafter rested.

On or about the 16th day of June, 1989, after arguments of counsel and after having been instructed on all matters of law the jury returned its special verdict as follows:

> "We, the jury, do hereby render our unanimous verdict as follows:
>
> "1. Was Tony Nathalia acting as Sky Chefs' agent with respect to Connie Dias' claims?
>
> "Yes x
>
> "No _____
>
> "If your answer is 'no,' your verdict is for Sky Chefs. The presiding juror will date and sign this verdict form and signal the clerk.
>
> "If your answer is 'yes,' please proceed to questions 2, 3 and 4.

"2. Did Tony Nathalia intentionally cause Connie Dias to suffer extreme emotional distress?

"Yes __x__

"No _____

"Proceed to question 3.

"3. Did Tony Nathalia wrongfully discharge Connie Dias in retaliation for her protesting the sexual harassment of others?

"Yes __x__

"No _____

"Proceed to question 4.

"4. Did Tony Nathalia discriminate against Connie Dias because she filed a workers' compensation claim?

"Yes _____

"No __x__

"If your answer is 'no' to questions 2, 3 and 4, your verdict is for Sky Chefs. The presiding juror will date and sign this verdict form and signal the clerk.

"If your answer is 'yes' to either question 2 or 3, please proceed to question 5.

"5. What are Connie Dias' damages, if any, for her claims for emotional distress and wrongful discharge?

"General Damages $ 125,000.00

"Punitive Damages $ 500,000.00

"If your answer is 'yes' to question 4, please proceed to question 6.

"6. What are Connie Dias' damages, if any, for her claim that she was discriminated against because she filed a workers' compensation claim.

"General Damages $ _____

"DATED this *16th* day of June, 1989.

"/s/ Judy Robbins
Presiding Juror"

BASED UPON the foregoing special verdict, it is hereby

ORDERED and ADJUDGED that Plaintiff recover from and have judgment against Defendant in the sum of $125,000.00 general damages, $500,000 punitive damages, plus her costs and disbursements incurred herein.

DATED this 23 day of June, 1989.

/s/ Helen J. Frye
THE HONORABLE
HELEN J. FRYE
United States
District Judge

Presented By:

/s/ Richard C. Busse
RICHARD C. BUSSE
Of Attorneys for Plaintiff

CERTIFICATE OF MAILING

I hereby certify that I served the foregoing Judgment on the following:

Richard L. Sadler, Esq.
Copeland, Landye, Bennett
and Wolf
3500 First Interstate Tower
Portland, Oregon 97201

Walter V. Siebert, Esq.
Sherman and Howard

3000 First Interstate Tower North
633 Seventeenth Street
Denver, Colorado 80202

Of Attorneys for Defendant

on June 20, 1989 by mailing to said attorneys a copy each thereof, contained in a sealed envelope, with postage prepaid, addressed to said attorneys at their last known addresses as stated above, and deposited in the United States Post Office at Portland, Oregon on said day.

DATED this 20 day of June, 1989.

/s/ Richard C. Busse
RICHARD C. BUSSE
Of Attorneys for Plaintiff

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CONNIE DIAS, *Plaintiff-Appellee,* v. SKY CHEFS, INC., *Defendant-Appellant.*	No. 89-35778 D.C. No. CV-88-367-FR OPINION

Appeal from the United States District Court
for the District of Oregon
Helen J. Frye, District Judge, Presiding

Argued and Submitted
July 13, 1990 – Portland, Oregon

Filed November 27, 1990

Before: Betty B. Fletcher, Warren J. Ferguson and Ferdinand F. Fernandez, Circuit Judges.

Opinion by Judge Ferguson

SUMMARY

Torts

Affirming a district court judgment, the court of appeals held that on the facts of this case a jury could reasonably conclude that a woman employee was wrongfully discharged for resisting the sexual harassment of a company's general area manager.

Connie Dias worked in appellant Sky Chefs, Inc.'s billing department. The area manager of the facility engaged in ongoing sexual harassment of women employees that included comments on their physical attributes, physical appearance, and the setting of standards for wearing dresses or skirts, nylons and heels specifically so that he could admire women employees' legs. Dias asserted that when she refused to wear nylons and heels, confronted the area manager about the dress standards, and complained to other lower level supervisors about the area manager, the area manager began to complain about Dias' work performance and had her reprimanded several times for trivialities. Dias' location was changed, and she was instructed by the manager not to talk to other women. Dias alleged that this treatment caused her severe emotional distress. She injured herself at work, filed a workers' compensation claim and took a leave of absence. Upon her return to work, the manager informed Dias that her position had been terminated. Dias filed suit in district court, alleging wrongful discharge for protesting the sexual harassment of her coworkers, intentional infliction of emotional distress, and discrimination against her for having applied for workers' compensation benefits. The jury found for Dias on the wrongful discharge and intentional tort claims. The jury awarded Dias $125,000 in general damages, and $500,000 in punitive damages.

[1] At trial a number of witnesses testified supporting the Dias allegations of sexual harassment in the workplace, and of Dias' resistance to it. A jury could well have concluded that her firing was caused by her actions

involving this important public interest. [2] The standards for intent and for socially tolerable conduct depend on the type of relationship that exists between plaintiff and defendant. An employer-employee relationship imposes a greater obligation to refrain from inflicting mental distress than the obligation that exists between strangers. [3] In this case, Dias did not need to show that the employer's actions were intended to cause the specific psychological injury that resulted, so long as she showed that those actions were a tactic designed to stifle opposition to sexual harassment. Dias so argued, and the jury reasonably agreed. [4] In Dias' case, the injury she suffered was distinguishable from ordinary employment abuses because it was carried out in the context of an allegedly sexually abusive work environment intentionally established by Sky Chefs' local general manager. The jury was entitled to consider that context and the intent behind the manager's specific acts in its determination of outrageousness. [5] An employer is liable for the torts of an employee if the employee acts within the scope of employment. [6] Clearly, the specific egregious act will itself rarely be of a kind that the employee was hired to perform. The appropriate inquiry is whether the employee committed the tort while performing, or in connection with, his job responsibilities.

[7] Sky Chefs acknowledged that the local general manager was its highest-ranking corporate manager and its agent for such purposes as general supervision of Dias and others. The jury reasonably could have concluded that the manager viewed Dias' resistance to his sexual harassment as undercutting his approach to furthering discipline and productivity among women employees.

The jury could reasonably conclude that Dias' firing was in furtherance of the manager's administrative responsibilities and within the scope of his employment, despite the fact that his approach was misguided and contrary to public policy. **[8]** The court noted that given the importance of deterring corporate practices, including hiring decisions, that permit abuse of women who resist sexual harassment on the job, it found nothing in the record to indicate that the amount of punitive damages was outrageous. A jury could reasonably have concluded that the punitive damage award was an appropriate penalty and deterrent. **[9]** Dias' general damages for intentional torts were not compensable nor preempted by Oregon's Workers' Compensation Act, and Sky Chefs' simple assertions were inadequate to justify overturning the jury verdict. **[10]** Admitted testimony on discussions of sexual harassment not directly protested by Dias, to which Sky Chefs objected, was relevant both to show Sky Chefs' awareness of and failure to rectify the harassment, and to show the basis for and significance of the protests that Dias did in fact make. **[11]** On some occasions, the district court permitted Dias' attorney to establish her knowledge of specific incidents of sexual harassment after questions were put to witnesses about harassment, rather than before, by way of foundation. The trial court's decision on this matter, as on the remaining issues objected to by Sky Chefs, was within its discretion. **[12]** Given the justifiable flexibility of the district court's evidentiary rulings, there was no indication of deliberate disregard of that court's orders to limit testimony about sexual harassment

to statements familiar to Dias. Nor was there any evidence that Dias' attorney intentionally introduced evidence that he knew was improper.

[13] The court rejected Sky Chefs' claim that its fifth amendment right to equal protection was violated by Dias' exercise of peremptory challenges allegedly based on gender. **[14]** Sky Chefs, a corporation, could not claim to be a member of the constitutionally protected class allegedly excluded from the jury, i.e., males. The court did not reach the question of whether or not males are a constitutionally cognizable suspect class since Sky Chefs was not even a member of that class. The court was not aware of any authority that in an individual case a corporation was entitled to a jury of any particular gender under the equal protection clause. **[15]** The court noted that nothing in equal protection jurisprudence suggests that corporations should be considered a suspect class meriting heightened judicial review. Sky Chefs did not show that the peremptories were irrational or discriminatory against corporations as a class. **[16]** In addition, Sky Chefs could not meet the established three-part test that would allow it to take on the government's role and assert the rights of the excluded veniremembers. **[17]** Having found that Sky Chefs had no standing to raise a claim of equal protection on the issue of excluded jury members, its due process claim to an evidentiary hearing examining the motives behind the peremptory strikes also failed.

COUNSEL

Walter V. Siebert and Susan K. Grebeldinger, Sherman & Howard, Denver, Colorado, for the defendant-appellant.

Richard C. Busse, Portland, Oregon, for the plaintiff-appellee.

OPINION

FERGUSON, Circuit Judge:

Sky Chefs, a Delaware corporation, appeals from a jury verdict finding it liable for the actions of its Portland, Oregon general manager, Mr. Tony Nathalia. The jury found that Nathalia sexually harassed women employees and intentionally inflicted emotional distress upon and ultimately wrongfully discharged a women employee, Ms. Connie Dias, for resisting that sexual harassment. We affirm.

I.

Sky Chefs, Inc. is a Delaware corporation headquartered in Dallas, Texas. It maintains a number of regional facilities in the United States, each of which is directed locally by a General Manager. In Portland, the General Manager is responsible for "general supervision" of approximately 230 employees. The company supplies meals to airlines.

Dias began work at the Portland, Oregon facility in April 1985 as a clerical worker in the billing department. In September 1986 she was promoted while working under General Manager Jim Durham. Later that month,

Nathalia replaced Durham as the Portland General Manager. Nathalia had been transferred by the company from its San Diego facility, where he had also served as General Manager.

According to Dias and other witnesses at trial, Nathalia upon arrival engaged in ongoing sexual harassment of women employees. The harassment included daily comments on the breasts, buttocks, and physical appearance of individual women; suggestions to women that they show Nathalia "a good time" and treat him as well as the women employees in the San Diego facility had treated him; staff meetings at which he established job standards for women employees that included the wearing of dresses or skirts, nylons and heels specifically so that he could admire women employees' legs. Nathalia denied these allegations at trial.

Dias asserted that she refused to wear nylons and heels and confronted Nathalia about the dress standards; that she complained to lower-level supervisors about Nathalia; that she acted as a spokesperson for other women employees in complaining to local supervision about the sexual harassment. She alleged that particularly after complaining to Office Manager Tom Illk, Nathalia began to make numerous remarks to Dias complaining about her personal appearance and criticizing her work performance. She alleged that Nathalia changed her work location, instructed her not to talk with women in other departments, "overscrutinized and sabotaged her work; directed supervisors to discipline her for trivialities; interfered with her receipt of benefits; [and] had her followed." Dias alleged that this treatment caused her severe emotional distress. In June 1987 she fell at work,

injuring herself. She filed a workers' compensation claim and took a leave of absence. Her physician released her for a limited duty return to work as of December 7, 1987, with a recommendation that she gradually increase her hours to full-time work. However, upon her return to the office on December 7, Dias alleged that her supervisor informed her that her position had been eliminated, that the company had no work for her, and per General Manager Nathalia's recommendation, Dias was terminated.

Following her termination, Dias filed suit in federal district court, which had diversity jurisdiction under 28 U.S.C. § 1332. She alleged three claims: wrongful discharge for protesting the sexual harassment of her coworkers; intentional infliction of severe emotional distress; and discrimination against her for having applied for workers' compensation benefits. The jury found for Sky Chefs on the workers' compensation claim, but found for Dias on the wrongful discharge and intentional tort claims. The jury awarded Dias $125,000 in general damages and $500,000 in punitive damages.

Sky Chefs filed a post-trial motion for judgment notwithstanding the verdict, which was denied. It now appeals, asserting the following:

(1) The evidence could not, as a matter of law, support a finding of liability for wrongful discharge or intentional infliction of emotional distress;

(2) Punitive damages could not be awarded in this case as a matter of law; and the general damages were excessive;

(3) Sky Chefs is entitled to a new trial, because of misconduct by Dias' attorney and because of various mistakes by the trial court;

(4) Sky Chefs was denied a fair trial because the only three men in the jury venire were struck by peremptory challenge, leaving an all-woman jury.

We address the claims sequentially.

II.

We will reverse a jury finding of liability only if "without weighing the credibility of the witnesses, the evidence and its inferences, considered as a whole and viewed in light most favorable to the [prevailing] party . . . can support only one reasonable conclusion. . . . " *Davison v. Pacific Inland Nav. Co., Inc.*, 569 F.2d 507, 509 (9th Cir. 1978); *see also Walker v. KFC Corp.*, 728 F.2d 1215, 1223 (9th Cir. 1984). Since this is a diversity action, we apply the law of Oregon to the claims of wrongful discharge and intentional infliction of emotional distress. *County of Maricopa of State of Ariz. v. Maberry*, 555 F.2d 207, 210 (9th Cir. 1977).

A. *Wrongful Discharge.*

Under Oregon Law,

> [T]he common law rule for "at will" employment prevails unless the employe is discharged while pursuing a right related to his or her role as an employe and the right is one of important public interest indicated by constitutional and statutory provisions and caselaw. . . . We have stated that sexual harassment on the job is a

> forbidden discriminatory act under state and federal law and an employe has a legal right which is of important public interest not to be discharged for resisting sexual harassment on the job.

Holien v. Sears, Roebuck & Co., 689 P.2d 1292, 1300 (Or. 1984).

[1] Dias alleged that she was discharged principally for "resisting sexual harassment on the job" At trial a number of witnesses testified supporting the allegations of sexual harassment and of Dias' resistance to it. A jury could have concluded that her firing was caused by her actions involving this "important public interest."

B. *Intentional Infliction of Emotional Distress.*

Under Oregon law the general requirements for this tort action are as follows:

> To succeed on a claim for the intentional infliction of severe emotional distress plaintiff must show that (1) defendant intended to inflict severe emotional distress on plaintiff; (2) defendant's acts did in fact cause plaintiff to suffer severe emotional distress; (3) defendant's acts consisted of "some extraordinary transgression of the bounds of socially tolerable conduct."

Lewis v. Oregon Beauty Supply Co., 733 P.2d 430, 436 (Or. 1987).

[2] The standards for intent and for socially tolerable conduct depend on the type of relationship which exists between plaintiff and defendant. "[A]n employer-employee relationship . . . imposes a greater obligation to refrain from inflicting mental distress than the obligation

which exists between strangers." *Trout v. Umatilla Co. School District*, 712 P.2d 814, 818-819 (Or. App. 1985).

The Oregon Supreme Court has held that "the duty to refrain from abusive behavior in the employment relationship comes closer to that of the physician toward a patient . . . than to that of . . . police officers toward a citizen not in custody and free to terminate the encounter. . . . " *Hall v. May Dept. Stores Co.*, 637 P.2d 126, 131 (Or. 1981).

[3] As to intent, the key inquiry is "whether the jury could find that [the company agent] attempted to threaten and frighten plaintiff as a deliberate tactic even though he knew that he did not have convincing evidence of misconduct on her part." *Id.* at 131; *see also id.* at 134 n. 4. In this case Dias need not show that the employer's actions were intended to cause the specific psychological injury which resulted, so long as plaintiff showed that those actions were a tactic designed to stifle opposition to sexual harassment. The plaintiff so argued and a jury could reasonably have agreed.

As to the standard of "outrageousness" in the employment context, "the key focus . . . is not on the result, but on the purpose and the means used to achieve it." *Patton v. J.C. Penney Co.*, 719 P.2d 854, 858 (Or. 1986). The defendant's behavior must be distinguishable from "the insults, ill temper, and offensive jokes that persons are expected to endure under contemporary standards of behavior." *Id.* (quoting *Brewer v. Erwin*, 600 P.2d 398, 411 (Or. 1979).

In cases such as *Patton*, 719 P.2d at 858, and *Snyder v. Sunshine Dairy*, 742 P.2d 57, 58 (Or. App. 1987), the Oregon courts have held that "rude" or "tyrannical" behavior by supervisors, or excessive supervision and unjustified reprimands, *when occurring in the context of discharges not invoking any significant public interest*, could not in themselves give rise to an intentional tort claim. At the same time, the outrageousness of the conduct is measured not merely by the severity of the acts themselves but also by the context in which the acts are committed. For example, in *Turman v. Central Billing Bur., Inc.*, 568 P.2d 1382, 1385 (Or. 1977) a case involving abuse of a debtor by a bill-collector, the outrageousness of the bill-collector's acts was judged not only by the collector's external acts – abusive language over the phone – but also by the contextual facts that the collector knew the debtor had made some payment on the bill, and that the debtor was impoverished and blind. *Id.*

[4] In Dias' case, the injury she suffered is distinguishable from ordinary employment abuses because it was carried out in the context of an allegedly sexually abusive work environment intentionally established by Sky Chefs' local general manager. The jury was entitled to consider that context and the intent behind the manager's specific acts in its determination of outrageousness. *See Hall*, 637 P.2d at 133 n.3 ("permissible" acts may become impermissible if done with illicit intent and knowledge of predictable illicit result).

C. *Respondeat Superior.*

Defendant claims that the company should not he held liable for Nathalia's acts, because any sexual harassment committed was Nathalia's sole responsibility.

[5] An employer is liable for the torts of an employee if the employee acts within the scope of employment. *Stanfield v. Laccoarce,* 588 P.2d 1271 (1978). Generally, whether an employee acts within the scope of employment depends on three factors:

> (1) whether the act occurred substantially within the time and space limits authorized by the employment; (2) whether the employee was motivated, at least partially, by a purpose to serve the employer; and (3) whether the act is of a kind which the employee was hired to perform.

Chesterman v. Barmon, 753 P.2d 404, 406 (Or. 1988) (citing *Stanfield v. Laccoarce,* 588 P.2d 1271 (1978) and *Gossett v. Simonson,* 411 P.2d 277 (1966)).

[6] Clearly the specific egregious act giving rise to an intentional tort claim will itself rarely be "of a kind which the employee was hired to perform;" the appropriate inquiry is whether the employee committed the tort while performing, or in connection with, his job responsibilities. *See, e.g.,* Holtzman and Trelz. *Recent Developments in the Law of Sexual Harassment: Abusive Environment Claims after Raritor Savings Bank v. Vinson,* 31 St. Louis U.L.J. 239, 276 (1987) ("Sexual harassment simply is not within the job description of any supervisor or any other worker in any reputable business."). The Oregon Supreme Court has discussed this issue in the following way:

> In *Fields. v. Lancaster Cotton Mills*, 77 S.C. 546, 58 S.E. 608 (1907), a corporation was held liable when the superintendent of a cotton mill directed and participated in the assault of one who sought to lure cotton mill employees to other jobs. The court held that Lancaster Cotton Mills was liable for the acts of the superintendent because he was entrusted with the control of its policies and the methods to be employed to prevent interference with its employees . . .
>
> . . .
>
> [T]he corporation is liable for the acts of one entrusted with the control of the company policy if the act was in the execution of a corporate function. . . . Newer cases reflect the concept that by giving one powers of management, the corporation "must be held to have invested him with authority to make decisions for it, when necessary, in connection with the performance of those duties. When made, the [employee's] judgment becomes the judgment of the defendant."

Chesterfield, 753 P.2d at 408 (Peterson, C.J., concurring) (citations omitted).

[7] In the present case, Sky Chefs acknowledges that in his capacity as General Manager, the highest-ranking corporate officer in Portland, "Nathalia was its agent for such purposes as general supervision of Dias and others." Sky Chefs further asserts that "Nathalia's motivation with respect to Dias was to obtain improved work performance." The jury reasonably could have concluded that Nathalia viewed Dias' resistance to sexual harassment as undercutting his approach to furthering discipline and productivity among women employees. The jury reasonably could have concluded that Nathalia's treatment of

Dias, including her discharge, was thus in furtherance of his administrative responsibilities and within the scope of his employment, despite the fact that his approach was misguided and contrary to public policy.

III.

Sky Chefs seeks review of the damage awards. "The jury's verdict should be accepted if it could reasonably have been reached" and a trial court's decision against remittitur is reversed only on a showing of "clear abuse of discretion." *Raynor Bros. v. American Cyanimid Co.*, 695 F.2d 382, 385 (9th Cir. 1982).

A. *Punitive Damages.*

"The rationale for allowing punitive damages is to punish the offender and to deter others from similar conduct." *Honeywell v. Sterling Furniture Co.*, 781 P.2d 379, 380-381 (Or. App. 1989).

Sky Chefs argues that the conduct alleged was not sufficiently aggravated to justify punitive damages as a matter of law. But as the Oregon Supreme Court has stated,

> [I]t seems clear that in a jurisdiction which generally allows punitive damages for grave intentional torts, punitive damages in principle are allowable when an "extraordinary" or "extreme" transgression of social norms is an indispensable element of the tort itself. When the jury is correctly instructed on that element of liability as well as on compensatory and punitive damages, and there is evidence to support its verdict as to liability, this tort leaves

> little room to scrutinize the facts for an additional degree of aggravation to support punitive damages.

Hall, 637 P.2d at 134-135.

[8] Sky Chefs does not allege that the jury was improperly instructed either on the standard of liability or on the standard for awarding punitive damages. Further, Oregon law has long held that punitive damages may be awarded when a company agent is "employed in a managerial capacity and [is] acting in the scope of employment." *Stroud v. Denny's Restaurant, Inc.*, 532 P.2d 790, 791 (1975); *see also* Hodel, *The Doctrine of Exemplary Damages in Oregon*, 44 Or.L.Rev. 175, 233 (1965). Given the importance of deterring corporate practices, including hiring decisions, which permit abuse of women who resist sexual harassment on the job, we find nothing in this record to indicate that "the amount of the verdict is 'outrageous,' 'shocking' or 'monstrous'." *Oliver v. Burlington Northern, Inc.*, 531 P.2d 272, 274 (Or. 1975). A jury could reasonably have concluded that the punitive damage award was an appropriate penalty and deterrent.

B. *General Damages.*

[9] Sky Chefs alleges that Dias' damages are compensable and preempted by the Oregon Workers' Compensation Act. Damages for intentional torts are not preempted. *Palmer v. Bi-Mart Co.*, 758 P.2d 888, 891 (Or. App. 1988).

Sky Chefs asserts that Dias' calculation of her non-economic damages, including treatment by a psychiatrist, was "not credible." Dias alleged that she was caused

severe emotional distress on the job during Nathalia's tenure. She alleged that she had never been discharged before, that after discharge she became depressed, suffered eating and sleeping disorders, and has had psychological difficulty returning to the workforce, resulting in her receiving welfare assistance for the first time in her life. She has had ongoing and regular treatment by a psychologist, and has incurred all medical bills since her discharge without medical insurance. In light of these allegations and our deference to the jury's decision, we find Sky Chefs' simple assertions inadequate to justify overturning the jury verdict.

IV.

Sky Chefs also seeks a new trial, alleging reversible errors by the trial court and misconduct by plaintiff's attorney. Trial court rulings on evidentiary matters, and on whether there has been attorney misconduct, are reviewed for abuse of discretion. *Chalmers v. City of Los Angeles*, 762 F.2d 753, 761 (9th Cir. 1985); *County of Maricopa of State of Ariz. v. Maberry*, 555 F.2d 207, 219 (9th Cir. 1977).

A. *Evidentiary rulings.*

[10] First, Sky Chefs asserts that all testimony regarding sexual harassment which Dias did not specifically protest should have been excluded. Sky Chefs cites to *Haskell v. Kaman Corp.*, 743 F.2d 113 (2d Cir. 1984), which is inapposite. *Haskell* was an Age Discrimination in Employment Act (ADEA) case, not an intentional tort case, in which testimony by plaintiff's co-workers on age

discrimination was submitted in an improper attempt to show a "pattern and practice" of age discrimination. *Id.* at 121-122. The standards of relevance in Dias' case are entirely different. Admitted testimony on discussions of sexual harassment not directly protested by Dias, to which Sky Chefs' objects, was relevant both to show Sky Chefs' awareness of and failure to rectify the harassment, and to show the basis for and significance of the protests which Dias did in fact make.

[11] Secondly, Sky Chefs asserts that Dias' attorney asked questions about incidents of sexual harassment without first establishing that Dias had knowledge of those incidents. Sky Chefs asserts that this was in violation of the court's order to "exclude the testimony by Dias of incidents of sexual discrimination not witnessed by her or not related to her while she was on the job because it's the job environment that is at issue here."

The trial court ruling at issue was directed at Dias' personal testimony. With regard to the testimony of others, and the court's attempts to limit testimony about sexual harassment to statements familiar to Dias, the court stated, "I'll try to carve out a rule and then within that rule there may be other objections at the time and I'll have to rule on those . . . and then within that broad ruling you'll have to make other objections." On some occasions, the trial court permitted plaintiff's attorney to establish Dias' knowledge of specific incidents of sexual harassment *after* questions were put to witnesses about harassment, rather than *before*, by way of foundation. The trial court's decision on this matter, as on the remaining issues objected to by Sky Chefs, was within its discretion.

B. *Attorney Misconduct.*

[12] Sky Chefs also alleges that Dias' counsel repeatedly asked objectionable questions beyond the limits of the court's orders described above, and that this constituted attorney misconduct. However, given the justifiable flexibility of the court's rulings, there is no indication of deliberate disregard of the court's orders. Nor is there any showing that Dias' attorney intentionally introduced evidence which he knew was improper. *Cf. Maberry,* 555 F.2d at 217-218. Therefore, these claims also must fail.

V.

Finally, Sky Chefs asserts that its Fifth Amendment rights were violated by the plaintiff's use of peremptory challenges to strike three males from the jury venire, leaving an all-woman jury, relying on *Batson v. Kentucky,* 476 U.S. 79 (1986). We review this issue of law *de novo, United States v. McConney,* 728 F.2d 1195, 1201 (9th Cir.) (en banc), *cert. denied* 469 U.S. 824 (1984). We pay it particular attention since this court has recently extended the *Batson* equal protection right to gender-based peremptory challenges in criminal cases. *United States v. De Gross,* No. 87-5226, slip op. at 10903 (9th Cir. Sept. 10, 1990).[1]

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[1] *De Gross* was decided on September 10, 1990, after briefing in *Dias* had already been completed. However, Sky Chefs may be entitled to the benefit of the rule announced in *De Gross* under the familiar principle that a judicial decision affecting

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For fifteen years, it has been clear that the systematic exclusion of women from jury *venires* is a form of gender discrimination which violates the "fair cross-section" guarantee of the Sixth Amendment in criminal cases. *Taylor v. Louisiana*, 419 U.S. 522 (1975). This holding was reaffirmed by the Supreme Court just last term, in *Holland v. Illinois*, ___ U.S. ___, 110 S.Ct. 803 (1990): the Sixth Amendment "entitles every defendant to object to a venire that is not designed to represent a fair cross section of the community, whether or not the systematically excluded groups are groups to which he himself belongs." *Id.*, 110 S.Ct. at 805 (citing *Taylor)*. Of course, Sky Chefs has not and cannot claim this privilege under the Sixth Amendment, since defendants in *civil proceedings*, whether black, white, male, female, or corporate, do not enjoy Sixth Amendment rights.

However, since 1986, black criminal defendants have also enjoyed the right to object to purposeful discrimination through the use of peremptory challenges against

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federal civil law applies retroactively, unless it would produce "inequitable results." *Reed v. Hoy*, 909 F.2d 324, 327 (9th Cir. 1989); *Chevron Oil v. Huson*, 404 U.S. 97, 106-08 (1971) (discussing factors to consider in determining whether a decision should apply only prospectively). For the purposes of this case, we assume without deciding that *De Gross* applies retroactively.

In extending the *Batson* equal protection right to gender-based challenges, *De Gross* broke new ground by also allowing a prosecutor to object to a defendant's peremptories. *De Gross* at 10904. However, the panel was careful to point out that the U.S. Attorney had standing to assert this right only on behalf of the *excluded juror*, not the government. Therefore, *De Gross* itself affords no new rights to civil defendants or plaintiffs, such as Sky Chefs or Dias. *Id.* at 10898 & n.5.

members of their own race, under the equal protection clause of the Fourteenth Amendment. *Batson v. Kentucky*, 476 U.S. 79 (1986). This right is based on ethnic group membership rather than status as a criminal defendant; however, it has never been extended to civil cases, to corporate defendants, or to cross-racial peremptory challenges in this circuit.[2]

[13] Like Batson, Sky Chefs claims that its Fifth Amendment right to equal protection was violated by the plaintiff's exercise of peremptory challenges allegedly based on gender. *See United States v. De Gross*, No. 87-5226, slip op. at 10903 (9th Cir. Sept. 10, 1990). But the

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[2] *See, e.g. United States v. Vaccaro*, 816 F.2d 443 (9th Cir. 1987), *cert. denied* 484 U.S. 914. It should be noted that the Supreme Court has recently emphasized the distinction between *Taylor*'s Sixth Amendment-based "fair cross-section" right, which guarantees a representative jury venire regardless of the defendant's race or sex, and the *Batson* equal protection right, which covers race-based peremptory challenges, and ensures only that members of a defendant's *own race* may not be discriminatorily excluded from her jury. As Justice Scalia commented, "[t]he Sixth Amendment requirement of a fair cross-section on the venire is a means of assuring, not a representative jury (which the Constitution does not demand), but an impartial one (which it does)." *Holland* at 807.

In *Holland* itself, however, several Justices expressed their readiness to extend *Batson* to peremptory challenges which operate on racial lines, regardless of the defendant's race. *See Holland*, 110 S.Ct. at 811 (Kennedy, J., concurring), 813 (Marshall, J., dissenting), & 821 (Stevens J., dissenting). Should such an extension occur, however, there is no reason to assume that it would apply to corporate defendants, to gender-based claims, or to civil cases.

confines of this equal protection right are narrow. To assert such a claim the petitioner must either be a member of the constitutionally protected class being excluded, *Batson* at 86, or must be asserting the rights of the excluded jury members, rather than his or her own rights, *De Gross* at 10898.

[14] Petitioner, a corporation, cannot claim to be a member of the constitutionally protected class allegedly excluded from the jury, i.e., males.[3] We need not reach the question of whether or not males are a constitutionally cognizable "suspect class" since defendant is not even a member of that class. Although the Court has yet to rule on "whether a defendant's race affects his standing to invoke *Batson*", *Holland* at 814 (Marshall, J., dissenting), we are aware of no authority that in an individual case a corporation (or even a male defendant) is entitled, under the equal protection clause, to a jury of any particular gender. *Cf. Apodaca v. Oregon*, 406 U.S. 404, 413 (1971).

[15] Even if *Batson* were to be extended to allow black defendants to challenge peremptory strikes of white venirepersons or vice versa, *see Holland* at 811-812 (Kennedy, J., concurring), 813-814 (Marshall, J., dissenting), 821-822 (Stevens, J., dissenting), it does not logically following that corporations would be allowed the same latitude. Nothing in equal protection jurisprudence suggests that corporations should be considered a suspect class meriting heightened judicial review. *See, e.g., Railway Express Agency v. New York*, 336 U.S. 106 (1949). Sky

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[3] The transcript indicates that three men and five women were struck from the jury by peremptory challenges, but not which side struck which juror. Record at 40-41.

Chefs has made no attempt to show that the peremptories were irrational or discriminatory against corporations as a class.

Peremptory challenges are an important aspect of the trial process, as *Holland* emphasizes:

> The tradition of peremptory challenges for both the prosecution and the accused was already venerable at the time of Blackstone. . . . Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury.'

Id. at 808-809 (citations omitted). Such goals clearly supply a rational basis for the tradition of allowing peremptory challenges in civil jury trials. Since the corporation cannot claim that members of its own "race" were discriminatorily excluded, Dias' peremptory challenges did not violate Sky Chef's equal protection rights under *Batson*.

However, this does not end the inquiry. We must also examine whether petitioner has standing under *De Gross* to assert the equal protection rights of the excluded jurors themselves. *See De Gross* at 10898. Ms. De Gross appealed her conviction on criminal charges of transporting aliens, claiming that the district court erred in denying her peremptory challenge of a male venireperson.[4] The government's objection to the peremptory was sustained, and

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[4] De Gross had struck seven men from the venire and the government objected at the eighth. When finally empaneled, the jury consisted of three men and nine women. *De Gross* at 10897.

we affirmed the trial court's decision, after concluding that the government did have standing to make the objection, based not on its own rights but on the rights of the excluded juror and on the government's unique position as guardian and defender of the jury system.[5] Three factors were considered by the *De Gross* court in granting third-party standing to the U.S. Attorney on behalf of the excluded jurors: (1) the government has a sufficient relationship to the venireperson to ensure vigorous defense of their rights, (2) excluded venirepersons are effectively deterred from asserting their own rights, and (3) the United States as a whole suffers an injury when the venireperson's rights are violated in a criminal case, since the entire jury system is impugned and the government's interest in fair trials is injured. *Id.* at 10899-900.

Third-party standing is generally disfavored by the courts, on both constitutional and prudential grounds. *See, e.g., Valley Forge College v. Americans United,* 454 U.S. 464, 474 (1982). "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal

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[5] The court also found that state action was present, based on the trial judge's ultimate authority over the entire process: "the defendant's action in striking venirepersons is fairly attributable to the state." *Id.* at 10906. *Accord, Fludd v. Dykes,* 863 F.2d 822 (11th Cir. 1989), (*Batson* claim available in race-based civil rights action); *cert. denied sub nom. Tiller v. Fludd,* ___ U.S. ___, 107 L.Ed.2d 154 (1989). *Cf. Edmonson v. Leesville Concrete Co.,* 895 F.2d 218 (5th Cir. 1990) (en banc) (*Batson* not applicable to civil rights cases because peremptories not "state action"), *cert. granted* 50 U.S.L.W. 3243 (U.S. October 1, 1990).

conduct of the defendant,' " and that the injury is redressable by the courts. *Id.* at 472. Furthermore, "prudential principles" also mitigate against allowing third-party standing: "the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim on the legal rights or interests of third parties." *Id.* at 474.

[16] As in *De Gross*, the corporation here seeks to extend *Batson* to a gender-based peremptory challenge. However, as we have seen, Sky Chefs has no *Batson* rights of its own. Furthermore, Sky Chefs cannot meet the three-part test established in *De Gross*, which would allow it to take on the government's role and assert the rights of the excluded veniremembers, as did the U.S. Attorney in that case. The second requirement of the three elements is met, since clearly the excluded venirepersons in this case can no more protect their own rights than could the excluded jurors in *De Gross*.

However, Sky Chefs cannot satisfy either the first or the third element. It has no relationship with the venirepersons whatever except to obtain what it perceives to be a panel more favorable to its position. It has no interest in the rights of the venirepersons beyond its own self-interest. Its position is different from that of the government, which has a duty to protect the individual rights of each venireperson. Similarly, the third standing requirement is not met in this case, since Sky Chefs does not suffer any redressable injury when a venireperson's rights are violated. Unlike the U.S. government, a civil defendant has no inherent duty to safeguard the integrity of the judicial process and ensure that "[s]election procedures that purposefully exclude . . . persons from juries [do not] undermine public confidence in the fairness of

our system of justice." *Holland* at 821 (Stevens, J., dissenting) (quoting *Batson* at 87). Thus, we hold that petitioner lacks standing to sue on behalf of the male jurors who were allegedly excluded due to their gender.

[17] Having found that petitioner has no standing to raise a claim under either *Batson* or *De Gross*, petitioner's due process claim to an evidentiary hearing examining the motives behind the peremptory strikes must also fail.[6] Since, as a corporate defendant in a civil case, petitioner cannot claim any "fair cross-section" right under *Taylor* or *Holland*, it lacks sufficient racial identity to assert a *Batson* claim, and also lacks standing to assert the rights of the three male venirepersons under *De Gross*,

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[6] The timeliness of Sky Chefs' objection was also problematic, since it was not raised until after the jury had been empaneled and the remaining venirepersons excused. *See U.S. v. Thompson*, 827 F.2d 1254, 1257 (9th Cir. 1987) (*Batson* objections must occur as soon as possible, preferably before jury is empaneled).

Here, the objection was raised only after the jury had been sworn, the court had recessed and reconvened, defendant's motions in limine had been presented and argued, and defendant had noted several other objections. Sky Chefs did not ask the judge to conduct a *Batson* hearing on the issue of discriminatory intent, but merely stated "for the record" that "[w]e think there has been a systematic exclusion of males from the jury and that is evidenced by the list that went back and forth . . . " Transcript at 57.

Unlike *Thompson*, this objection could have been raised much earlier, and the plaintiff here was prejudiced by its

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the peremptory challenges must be upheld and the jury's verdict affirmed.

AFFIRMED.

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tardiness. The objection could have been raised when petitioner's lawyer first saw the list of challenged jurors, when the challenged jurors were asked to move to the back of the room, immediately after the jury was sworn in, or when the judge recessed the court. Had the objection been contemporaneous with the voir dire, the court could have requested an explanation from the plaintiff and denied the challenge if no neutral explanation was presented, as he did in *De Gross*. Where, as here, the claimed discrimination is apparent before the close of voir dire, an objection made after jury empanelment is arguably untimely.